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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 538

THEODORE W. KELLER AND DOROTHY L. KELLER, CO-PARTNERS TRADING UNDER THE NAME OF HOWARD MANUFACTURING COMPANY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Tax Court (R. 46-56) is not reported. The *per curiam* opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 68) is reported at 207 F. 2d 610.

JURISDICTION

The judgment of the Court of Appeals was entered on October 1, 1953 (R. 69). A timely petition

for rehearing in banc was denied on December 1, 1953 (R. 89). The petition for a writ of certiorari was filed on January 16, 1954. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. If Section 403(e) of the 1942 Renegotiation Act (as amended) be construed to accord finality to rulings by the Tax Court on question of law and fact, not involving jurisdictional or constitutional issues, arising in the course of the Tax Court's redetermination of the amount of excessive profits—

(a) Did the Court of Appeals err in ruling that the particular issue presented by petitioners for review was not jurisdictional?

(b) Assuming that the issue presented for review was not jurisdictional, does the according of such finality to a determination of the Tax Court violate the due process clause of the Fifth Amendment?

2. Whether the death of Judge Proctor after he had concurred in the unanimous opinion of the court below but before the opinion was filed invalidates the judgment.

STATUTES INVOLVED

1. Section 403(e) of the Renegotiation Act (Sixth Supplemental National Defense Appropriation Act, 1942, 56 Stat. 226, 245) as amended by the Revenue Act of 1943 (Act of February 25, 1944, c. 63, Title VII, 58 Stat. 21, 78, 86) (50 U.S.C. App. 1191(e)) provides, in pertinent part, as follows:

> Any contractor or subcontractor aggrieved by an order * * * determining the amount

of excessive profits received or accrued by such contractor or subcontractor may * * * file a petition with The Tax Court of the United States for a redetermination thereof. Upon such filing such court shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor, and such determination shall not be reviewed or redetermined by any court or agency. * * *.

2. 28 U.S.C. 46 provides, in pertinent part, as follows:

* * * * *

(b) In each circuit the court may authorize the hearing and determination of cases and controversies by separate divisions, each consisting of three judges. Such divisions shall sit at the times and places and hear the cases and controversies assigned as the court directs.

(c) Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in active service. A court in banc shall consist of all active circuit judges of the circuit.

(d) A majority of the number of judges authorized to constitute a court or division thereof, as provided in paragraph (c), shall constitute a quorum.

STATEMENT

The War Contracts Price Adjustment Board had unilaterally determined petitioners' excessive profits for the fiscal year ended December 31, 1943, to be $1,270,000. Upon a petition for redetermination, the Tax Court redetermined that petitioners' excessive profits for that period amounted to $1,100,000. On appeal, the Court of Appeals for the District of Columbia Circuit dismissed the petition for review for lack of jurisdiction. The pertinent facts are as follows:

On December 31, 1943, petitioners and the Undersecretary of War entered into a bilateral agreement eliminating as excessive $60,000 of the profits realized by petitioners during the fiscal year ended December 31, 1942 (R. 35-38). The excessive profits thus eliminated were computed on a cash basis, the same accounting basis used by petitioners in filing their tax returns for the 1942 and 1943 fiscal years (R. 47). In contemplation of a possible change in petitioners' accounting basis for tax purposes, the bilateral agreement expressly provided for reopening of renegotiation in the event that petitioners' method of accounting for tax returns was changed to an accrual basis (R. 36-37).

On July 12, 1944, the Bureau of Internal Revenue determined that petitioners must compute their income on the accrual basis of accounting (R. 32-35). Petitioners agreed to this change, and, as a result, petitioners' net income for 1942 was increased by $121,537.06 (R. 33, 34, 48).

Pursuant to the terms of the bilateral renegotia-

tion agreement, renegotiation was reopened for the 1942 fiscal year (R. 48). Petitioners took the position, however, that renegotiation should be determined on the cash rather than the accrual basis. On the cash basis, this additional income was attributable to the 1943 fiscal year. On the other hand, if renegotiation was determined on the same basis as that used for tax purposes, this additional income was allocable to 1942 (R. 53).

Agreement was not reached, and on May 10, 1945, the War Department Price Adjustment Board, acting on behalf of the Secretary of War, issued a unilateral order eliminating, on an accrual basis, $180,000 as excessive profits for 1942—$120,000 in addition to the $60,000 eliminated under the bilateral agreement (R. 38-41, 48). On the same day, the War Department Price Adjustment Board, acting on behalf of the War Contracts Price Adjustment Board, unilaterally determined that petitioners' excessive profits for the fiscal year ended December 31, 1943, were $1,150,000 (R. 22-24). Since it might ultimately be held that petitioners' excessive profits were renegotiable on the cash rather than accrual basis, and, accordingly, that the $120,000 (added for 1942) was attributable to 1943 rather than 1942, an additional $120,000 was added to the determination for 1943 to preclude the possibility that petitioners might escape renegotiation of that sum (R. 23, 53). In particular, the order for the 1943 fiscal year provided for the elimination of two separate items as excessive profits, one for $1,150,000 and the second for $120,000. With respect

to the second item, the order further provided that "no part of such sum of $120,000 shall be eliminated hereunder which is or shall be repaid by cash, tax credit, or otherwise pursuant to the determination dated 10 May 1945 * * * with respect to the fiscal year of the Contractor ended 31 December 1942" (R. 23). On August 25, 1945, the War Contracts Price Adjustment Board ratified the unilateral determination for 1943 (R. 20-21).[1]

Thereafter, the instant proceeding was brought in the Tax Court for redetermination of the unilateral determination of the War Contracts Price Adjustment Board for the 1943 fiscal year (R. 13-18). No Tax Court review was sought for the unilateral order of the War Department Price Adjustment Board for the 1942 fiscal year (R. 65-66). In their petition, petitioners asked the Tax Court to hold that the Renegotiation Act was unconstitutional and that the Tax Court lacked jurisdiction to review the order appealed from because it undertook to eliminate or collect excessive profits for 1942 and was, therefore, void since the War Contracts Board had no jurisdiction over fiscal years ending before July 1, 1943 (R. 15-16, 17-18, 58-59). See footnote 1, *supra*, p. 6.

During the course of the hearings in the Tax

[1] The War Contracts Price Adjustment Board was created by Section 701(b) of the Revenue Act of 1943 (Act of February 25, 1944, c. 63, Title VII, 58 Stat. 21, 78), which amended the 1942 Renegotiation Act (Sixth Supplemental National Defense Appropriations Act, 1942, 56 Stat. 226, 245). As amended, renegotiation authority of the Secretary of War was limited to fiscal years ending before July 1, 1943, and renegotiation authority for subsequent fiscal years was vested in the War Contracts Price Adjustment Board.

Court, petitioners abandoned the constitutional issues raised in their petition (R. 62). Although contending that the War Contracts Price Adjustment Board had exceeded its jurisdiction, petitioners still had not at that time taken a definite position as to whether the $120,000 in issue was allocable to 1942 or to 1943 (R. 65-66).

The Tax Court rejected petitioners' argument that the order for the 1943 fiscal year was void, and concluded, on the evidence before it, that petitioners' excessive profits for 1943 were $1,100,000 (R. 46, 57). The Tax Court stated that (R. 50-51):

> The order shows on the face thereof that the fiscal year 1943 was the subject thereof, that $1,150,000 in one item, and in addition thereto $120,000 in a second item was determined to be excessive and subject to elimination. So far, obviously, the order is not void for the statute does not require the amount determined to be excessive profits and eliminable to be stated in one item. The order then goes on to provide that the $120,000 should also be eliminated except, in substance, any part of that sum repaid by cash, tax credits or otherwise, pursuant to a determination with respect to the fiscal year 1942. In our view, there is in this order no determination of excessive profits for 1942. This is indicated by the reference to a separate determination under a separate order, for 1942. The reference to 1942 is merely explanatory of the reason why this order, for 1943, provides for a conditional diminution of the elimination as to the $120,000 item. * * *

> Though such limitation on elimination "relates to profits accrued in the calendar year 1942," as petitioners urge, that does not mean that there is renegotiation or determination of excessive profits for the year 1942 or that an order or directive was made to eliminate or collect excessive profits for 1942. It was one "regarding the elimination or collection of excessive profits" for 1942 only in the sense that reference was made to the fact of possible repayment pursuant to the order for 1942, as the cause or justification for cutting down the amount of elimination for 1943. Neither the statute nor logic forbids such reference.

Continuing, the Tax Court pointed out that, far from providing for renegotiation or collection of excessive profits for 1942, the separation of the total determination of $1,270,000 into two separate items and the provision for *pro tanto* diminution of the second item of $120,000 were designed solely to protect petitioners against the possibility of double elimination of any part of the $120,000 from profits. To protect the Government's interest with respect to the question of cash or accrual accounting, "the Board might merely have made a determination that the excessive profit for 1943 was $1,270,000 despite the fact that another order, for 1942, had been entered for $120,000, which amount, if in fact petitioners were upon the accrual basis for both years, would be duplication" (R. 53). Instead of so doing, the Board expressly provided against duplication of elimination of the

item. "This, in our view, is the opposite of entrapment and the order does not fail clearly to advise the petitioners of the determination and is not ambiguous, doubtful or uncertain." (R. 53) [2]

After the Tax Court denied a motion for reconsideration (R. 58, 60), petitioners filed a petition for review in the court below. Argument was heard before Circuit Judges Edgerton, Clark and Proctor. Two weeks after the death of Judge Proctor, the court below filed a *per curiam* opinion dismissing the appeal for lack of jurisdiction on the authority of its earlier decision in *Psaty & Fuhrman, Inc.* v. *Stimson*, 182 F. 2d 985 (R. 68). [3] Appended

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[2] The Tax Court further held that, even if the paragraph of the Board's order relating to the $120,000 was void, it was wholly separable and the rest of the order was not thereby rendered void (R. 54, 55).

[3] In full, the opinion of the court below in *Psaty & Fuhrman, Inc.* v. *Stimson, supra*, states as follows:

> Petitioner, on March 16, 1942, entered into a contract with the Government for the construction of a hospital. The Secretary of War renegotiated the contract on a completed contract basis and, on February 7, 1944, made a unilateral determination that petitioner had excessive profits of $700,000. Petitioner applied to the Tax Court for a determination that the renegotiation of its contract must be upon a fiscal (which in this case was calendar) year basis. The Tax Court supported the Secretary.
>
> It is now settled that a question such as the one here before us, being neither constitutional nor jurisdictional, is one which the Tax Court under the statute, 50 U.S.C.A. Appendix § 1191, has exclusive and final jurisdiction to determine.[1] The petition must, therefore, be
>
> Dismissed.
>
> [1] Lichter v. United States, 1948, 334 U.S. 742, 68 S.C. 1294, 92 L. Ed. 1694; Aircraft & Diesel Equipment Corp. v. Hirsch, 1947, 331 U.S. 752, 67 S. Ct. 1493, 91 L. Ed. 1796; Macauley v. Waterman S.S. Corp., 1946, 327 U.S 540, 66 S. Ct. 712, 90 L. Ed. 839; Ring Const. Corporation v. Secretary of War of U.S., 1949, 85 U.S. App. D.C. 386,

at the bottom of the opinion was the notation that "Circuit Judge Proctor concurred in this opinion but died before it was filed." (R. 68). Subsequently, the court below denied a petition for rehearing in banc, which presented the identical issues raised here by petitioners (R. 71-89).

ARGUMENT

1. From the inception of litigation seeking appellate review of Tax Court redeterminations under the Renegotiation Acts, the court below has held that its appellate jurisdiction is limited to the review of constitutional and jurisdictional questions, and that Section 403(e) of the Act (*supra*, p. 2) "places exclusive and unreviewable jurisdiction in the Tax Court to determine the amount of excessive profits, including questions of both law and fact in such determination." *U. S. Electrical Motors* v. *Jones*, 153 F. 2d 134, 136 (C.A. D.C.); *Blanchard Machine Co.* v. *R.F.C.*, 177 F. 2d 727 (C.A. D.C.), certiorari denied, 339 U.S. 912; *Ring Construction Co.* v. *Secretary of War*, 178 F. 2d 714 (C.A. D.C.), certiorari denied, 339 U.S. 943; *Eastern Machinery Co.* v. *Under Secretary of War*, 182 F. 2d 99 (C.A. D.C.); *Psaty & Fuhrman, Inc.* v. *Stimson*, 182 F. 2d 985 (C.A. D.C.); *Lowell Wool By-Products Co.* v. *War Contracts Price Adjustment Board*, 192 F.

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178 F. 2d 714, certiorari denied, 1950, 339 U.S. 943, 70 S. Ct. 796; Eastern Machinery Company v. Under Secretary of War, 1950, 86 U.S. App. D.C. —, 182 F. 2d 99; Blanchard Mach. Co. v. Reconstruction Finance Corp., 1949, 85 U.S. App. D.C. 361, 177 F. 2d 727, certiorari denied, 1950, 339 U.S. 912, 70 S. Ct. 571; U.S. Electrical Motors v. Jones, 1946, 80 U.S. App. D.C. 329, 153 F. 2d 134.

2d 405 (C.A. D.C.); *Armstrong* v. *War Contracts Price Adjustment Board*, 194 F. 2d 875 (C.A. D.C.), certiorari denied, 343 U.S. 967; *Knu-Vise, Inc.* v. *War Contracts Price Adjustment Board*, 195 F. 2d 198 (C.A. D.C.). Contending that their appeal below was improperly dismissed, petitioners here argue, in the alternative, that the issue they raise is jurisdictional and that, in any event, Section 403(e) is unconstitutional insofar as it limits review of Tax Court redeterminations. Both contentions are without merit.

(a). Petitioners' assertion that the Tax Court lacked jurisdiction to redetermine the War Contracts Price Adjustment Board's determination of excessive profits is grounded upon the claim that the Board's order for the 1943 fiscal year was void because it included a determination of $120,000 as excessive profits for the 1942 fiscal year.[4] As shown in the Statement, *supra*, pp. 4-9, this argument has no foundation in fact.

The bilateral agreement fixed, on the cash basis of accounting, $60,000 as excessive profits for the 1942 fiscal year and provided for the reopening of renegotiation should petitioners' method of accounting be changed. When, at the insistence of the Bureau of Internal Revenue, petitioners' accounting method for tax purposes was changed, in July 1944, to an accrual basis, thereby increasing their income for the 1942 fiscal year by some $120,-

[4] As noted above, p. 6, fn. 1, Section 701 of the Revenue Act of 1943, *supra*, authorized the War Contracts Price Adjustment Board to determine excessive profits only with respect to fiscal years ending after June 30, 1943.

000, the Secretary undertook to reopen the 1942 renegotiation, as contemplated by the bilateral agreement. Petitioners took the position, however, that renegotiation should continue to be determined on the cash basis, which would put the $120,000 into the 1943 fiscal year, rather than on the accrual basis, which would cast it into 1942. Upon the failure to reach agreement, the Secretary and the War Contracts Price Adjustment Board each issued a unilateral order determining the $120,000 to be excessive profits; the Secretary's order related to the 1942 fiscal year, as to which the Secretary had jurisdiction, eliminating the $120,000 on an accrual basis, while the War Contracts Price Adjustment Board's order dealt with the 1943 fiscal year, as to which the Board had jurisdiction, eliminating it on a cash basis. Since the purpose of the dual orders was to preclude the possibility that petitioners might escape renegotiation of the $120,000 and not to eliminate the $120,000 twice, the Board's order expressly provided that "no part of such sum of $120,000 shall be eliminated hereunder which is or shall be repaid by cash, tax credit, or otherwise pursuant to the determination dated 10 May 1945 * * * with respect to the fiscal year * * * ended 31 December 1942" (R. 23).

Both on its face and viewed in context, the Board's order purports only to make a necessary accounting adjustment to renegotiate excessive profits for 1943. As the Tax Court observed in regard to the 1943 order before it, "there is in this

order no determination of excessive profits for 1942. This is indicated by the reference to a separate determination under a separate order, for 1942." (R. 51). Further, far from providing for renegotiation or collection of excessive profits for 1942, the separation of the $1,270,000 into two separate items and the provision for *pro tanto* diminution of the second item of $120,000 was designed solely for petitioners' protection.

As the Tax Court pointed out, to protect the Government's interests with respect to the cash or accrual basis question, "the Board might merely have made a determination that the excessive profit for 1943 was $1,270,000 despite the fact that another order, for 1942, had been entered for $120,000, which amount, if in fact petitioners were upon the accrual basis for both years, would be duplication. Instead of so doing, the Board though making, in our view, a determination of $1,270,000, in two items, for 1943, then expressly provided against duplication of elimination, by the paragraph complained of" (R. 53).

In short, the Board's order for 1943 here involved does not determine the $120,000 to be excessive profits for 1942 but simply makes a necessary accounting adjustment for the possibility that the $120,000 might ultimately be allocable to 1943 rather than 1942, and carefully protects petitioners against the possibility of double elimination of any part of the $120,000 as excessive profits. In the circumstances, both the Tax Court and the court be-

low correctly concluded that no jurisdictional question was presented.[5]

(b). Petitioners' argument that Section 403(e) fails to provide "adequate and effective appeal" to the courts from the Tax Court's redeterminations of excessive profits and so violates the due-process clause of the Fifth Amendment (Pet. p. 8) is substantially the same as that advanced in *Ring Construction Corp.* v. *Secretary of War,* No. 656, October Term, 1949, certiorari denied, 339 U.S. 943. In our view, the same reasons which warranted the denial of certiorari in that case are equally applicable here.[6]

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[5] *National Builders, Inc.* v. *Secretary of War,* 16 T.C. 1220 (cited at Pet. p. 16) does not conflict with the characterization of the instant question as non-jurisdictional. There, the Secretary of War, after the enactment of the amendments to Section 403 of the Renegotiation Act by Section 701 of the 1943 Revenue Act—which limited the Secretary's renegotiation authority to fiscal years ending before July 1, 1943, and vested authority for subsequent fiscal years in the War Contracts Price Adjustment Board—made a unilateral determination on a completed contract basis which included profits realized after July 1, 1943. Since the Secretary had not made any determination for the fiscal year ending July 1, 1943, and since Section 403(e)(2) of the Renegotiation Act authorizes review *vis a vis* the Secretary only of determinations with respect to a fiscal year ending before July 1, 1943, the Tax Court dismissed the proceedings for lack of jurisdiction. Here, there is no question that the War Contracts Price Adjustment Board had jurisdiction to make a determination for petitioners' 1943 fiscal year, and that the elimination of $1,150,000 was for 1943. The only issue was whether the additional $120,000 in the 1943 order was an elimination for 1943, as an accounting adjustment, or an elimination for 1942.

Maguire Industries v. *Secretary of War,* 12 T.C. 75, upon which petitioners also rely (Pet. p. 16), was reversed on appeal. 185 F. 2d 434 (C.A. D.C.).

[6] The Court may deem it of interest to be apprised of the state of appellate litigation in this field. To date, some 900 petitions for review under the 1942 Renegotiation Act have

Moreover, petitioners' claim is without merit, for it is plain that Congressional denial of appellate scrutiny of alleged errors of the Tax Court which do not relate to jurisdictional or constitutional matters does not constitute a violation of due process. Cf. *Spaulding* v. *Douglas Aircraft Co.*, 154 F. 2d 419, 427 (C.A. 9); *Stein Bros. Mfg. Co.* v. *Secretary of War*, 7 T.C. 863, 882-883. "To learn what the procedure must be in a particular situation, in order to constitute due process, we turn necessarily to the decisions of our Court. These tell us that due process does not require that a decision made by an appropriate tribunal shall be reviewable by another. *Pittsburgh, C., C. & St. L. Ry.* v. *Backus*, 154 U.S. 421, 426-427; *Reetz* v. *Michigan*, 188 U.S. 505, 508; *Dohany* v. *Rogers*, 281 U.S. 362, 369. They tell us that due process is not necessarily judicial process. *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272, 280; *McMillen* v. *Anderson*, 95 U.S. 37, 41; *United States* v. *Ju Toy*, 198 U.S. 253, 263. * * *" *St. Joseph Stock Yards Co.* v. *United States*, 298 U.S. 38, 76-77 (Brandeis, J., concurring). This Court has upheld provisions precluding review of questions comparable to those raised by petitioners in a number of cases. See, as examples, *Crane* v. *Hahlo*, 258 U.S. 142; *Hilton* v. *Merritt*, 110 U.S. 97; *Passavant* v. *United States*, 148 U.S. 214; *United States* v. *Ju Toy*, 198 U.S. 253; *Oceanic Navigation Co.* v. *Stran-*

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been filed in the Tax Court. Of those 900 odd cases, some 115 cases still remain on the docket of the Tax Court. Of the approximately 800 cases disposed of by the Tax Court, only some twenty cases were appealed to the courts of appeals.

ahan, 214 U.S. 320; cf. *Williamsport Co.* v. *United States*, 277 U.S. 551; *Heiner* v. *Diamond Alkali Co.*, 288 U.S. 502; see, also, *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297, 303-304; *Estep* v. *United States*, 327 U.S. 114, 120, 122-123; *St. Joseph Stock Yards Co.* v. *United States*, 298 U.S. 38, 76-82 (Brandeis, J., concurring). The validity of the finality provision is even stronger here since the agency issuing the allegedly erroneous order is the Tax Court which has "essentially judicial procedures and experience." *Aircraft & Diesel Corp.* v. *Hirsch*, 331 U.S. 752, 769; *Dobson* v. *Commissioner*, 320 U.S. 489, 498-499. See also *French* v. *War Contracts Price Adjustment Board*, 182 F. 2d 560 (C.A. 9); *Warner* v. *War Contracts Price Adjustment Board*, 188 F. 2d 363 (C.A. 9) (holding that the finality clause also precludes review of jurisdictional and constitutional issues by the courts of appeals).[7]

2. Petitioners' final contention is that the decision below is invalid because of the death of Circuit Judge Proctor after he had concurred in the unanimous opinion of the court but before the opin-

[7] Although the court below and the Ninth Circuit are in conflict as to the scope of the finality clause, the questions here raised by petitioners are not within the area of that conflict. The issue on which the conflict exists is whether the finality clause validly withholds appellate review of jurisdictional and constitutional matters. That question is not presented here. The issue here is whether the exclusion of appellate review of non-jurisdictional and non-constitutional questions is valid; as to this issue, no conflict exists and the courts of appeals are in accord. Should certiorari be granted, however, we reserve the right to urge that the judgment below should be affirmed on the ground that the courts of appeals are without jurisdiction to review Tax Court renegotiation orders on any issue.

ion was filed. This assertion flies in the face of the unequivocal language of 28 U.S.C. 46, which provides for divisions of three judges (28 U.S.C. 46(b) and (c) *supra*, p. 3) and declares that "a majority of the number of judges authorized to constitute a court or division thereof, as provided in paragraph (c), shall constitute a quorum." (28 U.S.C. 46(d) *supra*, p. 3). In holding in *Ayrshire Corp.* v. *United States*, 331 U.S. 132, that a decision by only two judges of a specially constituted three-judge court under the Urgent Deficiencies Act did not meet the statutory requirements that three judges "hear and determine" the suit, this Court significantly observed that the Urgent Deficiencies Act "makes no provision for a quorum of less than three judges. Two judges of a three-judge circuit court of appeals, on the other hand, ordinarily constitute a statutory quorum for the hearing and determination of cases" (331 U.S. at 138). The action taken by the two surviving judges below is fully in accord with this observation and with the result reached by other courts in which the problem has arisen. Cf. *Potter Title & Trust Co.* v. *Ohio Barge Line, Inc.*, 184 F. 2d 432 (C.A. 3), certiorari denied, 340 U.S. 955; *Ohio* v. *United States*, 6 F. Supp. 386 (S.D. Ohio), affirmed, 292 U.S. 498.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT L. STERN,
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FEBRUARY, 1954.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1954 [illegible]

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 538

THEODORE W. KELLER and DOROTHY L. KELLER, co-partners trading under the name of Howard Manufacturing Company, *Petitioners*,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

REPLY OF PETITIONERS TO BRIEF FOR THE UNITED STATES IN OPPOSITION.

The petitioners herein respectfully submit this reply brief to correct some of the erroneous and misleading statements contained in the government's brief in opposition to the petition for certiorari.

However, the petitioners are indebted to the Solicitor General's office for making clear in the last sentence of footnote 7 (p. 16, government's brief) *that the government in-*

tends to prevent any and all judicial review of Tax Court renegotiation orders.

The naked purpose of government counsel is revealed in these words (*supra*):

> "Should certiorari be granted, however, we reserve the right to urge that the judgment below should be affirmed on the ground that the courts of appeals are without jurisdiction to review Tax Court renegotiation orders *on any issue.*" (Emphasis supplied)

If the government succeeds in this undertaking, then the road will be cleared, by "precedent," to deny access to the United States Courts to citizens whose property or other rights have been violated by administrative tribunals (including the Tax Court), even though they may have exceeded their jurisdiction as in this case, or adopted procedures in conflict with the provisions of the Constitution of the United States.

Stated another way, the government seeks this Court's stamp of approval on a provision of "emergency legislation" that cuts citizens off from *any* judicial review of important decisions of an administrative agency.

Petitioners respectfully reiterate, therefore, that the questions involved are of sufficient importance to justify the granting of the writ so that the fundamental issues may be adequately presented in briefs and oral argument.

In footnote 6 (p. 15, government's brief) it is stated that 115 cases under the 1942 Renegotiation Act remain on the docket of the Tax Court. For the guidance of that agency, and of the lower federal courts, in disposing of cases under the 1942 Act and subsequent *similar* enactments relating to renegotiation, a definite decision by this Court would be of benefit.

* * * * *

1. Moving now to the body of the government's brief in opposition, petitioners call attention to the confused and

contradictory character of the defense of the War Contracts Price Adjustment Board's order ostensibly determining excessive profits only for 1943 but in reality illegally including a collection order for 1942 profits.

In *footnotes* (pp. 6 and 11) the government is obliged to admit that the Board had no authority over 1942 profits.

But, on pages 5, 8, 9, 11, 12, and 13, the government seeks to clothe the so-called 1943 order with legality by asserting in *contradictory* statements:

> (a) The disputed part of the order was "designed solely to protect petitioners against the possibility of double elimination of * * * profits." (p. 8 and 13)
>
> (b) "The purpose of the dual orders was to preclude the possibility that petitioners might escape renegotiation" of part of 1942 profits by reason of a change in accounting from a cash to an accrual basis. (p. 5, 12 and 13).
>
> (c) The Board desired to "protect" the petitioners against "duplication" of levy upon their profits, so it issued an order finding an "additional" $120,000 of excess profits for 1943 although the same $120,000 had been designated as excessive profits for 1942 by an order of the Secretary of War. (p. 13)
>
> (d) The Board's order for 1943—issued May 10, *1945*—"simply makes a necessary accounting adjustment for the possibility that the $120,000 might ultimately be allocable to 1943 rather than 1942." (p. 13)

The absurdity and hollowness of this latter contention is demonstrated by a glance at the last paragraph on page 4 of the government's own brief and its statement of facts showing that the alleged accounting question had been *settled* many months before:

> "On July 12, *1944*, the Bureau of Internal Revenue determined that petitioners must compute their income

on the accrual basis of accounting. (R. 32-35). *Petitioners agreed to this change,* and, as a result, petitioners' net income for 1942 was increased by $121,537.06 (R. 33, 34, 48)." (Emphasis supplied)

The record demonstrates, therefore, that there was no accounting question in dispute, or in existence even, that could possibly serve as a basis for the *duplicate* orders and *duplicate* excess profits levies upon the same $120,000 for 1942 and 1943.

The record shows that the government filed *two* suits, also, that included the same $120,000 item. The government was, in effect, attempting to extort from petitioners *all* of their so-called additional excessive profits for 1942, by one means or another, without any allowance for additional use of plant, capital, etc.

The simple fact is that the government tried to exert more "leverage" on the petitioners through the duplicate and illegal levy in the order issued ostensibly merely for 1943 profits.

2. Petitioners did *not* abandon the constitutional issues raised in their petition to the Tax Court, as stated on page 7 of the government's brief.

They merely waived *argument* in an administrative agency that had no authority to decide constitutional questions. But petitioners again raised the question of constitutionality in their brief to the Tax Court, following the hearing there.

3. Petitioners have raised an important jurisdictional issue and also a serious constitutional issue.

Careful examination of the whole array of cases which the government has cited as decisive of those issues against the petitioners fails to disclose any that preclude this court or the lower court from reviewing Tax Court decisions in renegotiation cases.

Indeed, the weight of authority is that the federal courts have a special obligation to review actions or decisions of administrative agencies in excess of their jurisdiction or in violation of Constitutional requirements, including that of due process of law.

The government, for instance, has misconstrued a leading case, *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272.

It has disregarded the *majority* decision of this court in another case, *St. Joseph Stock Yards* v. *U. S.*, 298 U.S. 38, wherein the right and duty of judicial review of administrative action were upheld. There the court said, among other expressions to the same effect:

> "To say that the findings of fact of legislative agencies may be made conclusive where constitutional rights of liberty and property are involved, although the evidence clearly establishes that the findings are wrong and that constitutional rights have been invaded, is to place those rights at the mercy of administrative officials and seriously impair the security inherent in our judicial safeguards. * * * Under our system, there is no warrant for the view that the judicial power of a competent court can be circumscribed by any legislative arrangement designed to give effect to administrative action going beyond the limits of constitutional authority." (*Supra*, l.c. 52).

And Justice Brandeis' concurring opinion, cited but NOT quoted by the government in its brief (p. 15) states:

> "The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied, and whether the proceeding in which facts were adjudicated was conducted legally. To that extent, the person asserting a right, whatever its source, should be entitled to the independent judgment of a court on the ultimate question of constitutionality." (*Supra*, l.c. 84)

In the case of *Estep* v. *U. S.*, 327 U.S. 114, 119, where the issue was the finality to be accorded to a Draft Board decision, and the law provided no judicial appeal, this court held, in effect, that review was not barred.

The words of Justice Murphy in that case are fully applicable in the present case:

> "But the war power is not a blank check to be used in blind disregard of all the individual rights which we have struggled so long to recognize and preserve. It must be used with discretion and with a sense of proportionate values. * * * As long as courts are open and functioning, judicial review is not expendable.
>
> "All the mobilization and all of the war effort will have been in vain if, when all is finished, we discover that in the process we have destroyed the very freedoms for which we fought." (*Supra*, l.c. 132).

The government's position in the present case is that the courts of the United States have no right to review a usurpation of jurisdiction and authority and an unlawful exercise of power by an administrative agency.

The writ should be granted so that the issue may be determined upon a full presentation of the facts and the law.

Respectfully submitted,

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